

This letter discusses nexus. See Quill Corp. v. North Dakota, 112 S.Ct. 1904 (1992). (This is a GIL.)

May 15, 2008

Dear Xxxxx:

This letter is in response to your letter dated April 29, 2008, in which you request information. The Department issues two types of letter rulings. Private Letter Rulings ("PLRs") are issued by the Department in response to specific taxpayer inquiries concerning the application of a tax statute or rule to a particular fact situation. A PLR is binding on the Department, but only as to the taxpayer who is the subject of the request for ruling and only to the extent the facts recited in the PLR are correct and complete. Persons seeking PLRs must comply with the procedures for PLRs found in the Department's regulations at 2 Ill. Adm. Code 1200.110. The purpose of a General Information Letter ("GIL") is to direct taxpayers to Department regulations or other sources of information regarding the topic about which they have inquired. A GIL is not a statement of Department policy and is not binding on the Department. See 2 Ill. Adm. Code 1200.120. You may access our website at www.tax.illinois.gov to review regulations, letter rulings and other types of information relevant to your inquiry.

The nature of your inquiry and the information you have provided require that we respond with a GIL. In your letter you have stated and made inquiry as follows:

We are writing this letter on behalf of a client ('**CLIENT**') to determine their responsibility to collect, remit, and file sales, use, income, property, or other state and local tax. Below is a summary of **CLIENT's** business activities and the scope of those activities within **ILLINOIS**. Furthermore, we have included specific questions on **ILLINOIS's** nexus requirements and request a preliminary review on the nexus status of **CLIENT** or, if not feasible, any guidance Client can use to assess nexus and their responsibility.

General Description of CLIENT Business Activity

CLIENT manufactures and sells tangible personal property (T.P.P.) as both a retailer and a wholesaler. The T.P.P. is used in, but not limited to, the Commercial Carrier, Marine, Manufacturing, Oil & Gas, and Service industries. The T.P.P. is a rotating high pressure nozzle used to clean the inside of tanks, railcars, containers, trailers, and vessels that carry beverages, food, oils, fuels, liquids, polymers, and other chemicals that may be hazardous or regulated. **CLIENT** ships this product throughout the World from their manufacturing plant in CITY/STATE. Their customer base consists of distributors, manufacturers, leasing companies, contractors, service providers, and end users.

The product has a life cycle between 1 month to 2 years depending on the operating conditions and hours of usage. It is usually attached to other T.P.P. that delivers the

cleaning agent to the nozzle and attaches the assembled device to the property cleaned. In some cases, the product is combined with other T.P.P. and is permanently attached to real property.

CLIENT Business Activity in ILLINOIS

CLIENT ships all product into **ILLINOIS** using a third party common carrier. **CLIENT** does not have any outlets, facilities, related companies, or Passive Investment Companies (P.I.C.) physically located in the state. **CLIENT** does not solicit orders in the state using a salesperson or other representative. Instead, orders are solicited through telephone, email, and/or the company's website. All orders are placed and accepted through telephone, fax, or email at the office address in STATE.

Current Interpretation of Nexus Requirements

Disregarding specific guidance from a state, we recommend that all clients assess nexus using the guidelines developed by the Supreme Court in Quill Corp. v. North Dakota ('Quill') with reference to Complete Auto Transit, Inc. v. Brady, National Bella Hess, Inc. v. Department of Revenue of Ill., and decisions from other cases upheld in part or full.

Considering the business activities of CLIENT, our initial assessment of nexus with **ILLINOIS** is based on the following:

- a. The bright line test of Bellas Hess (further upheld in Quill) which created a safe harbor for vendors 'whose only connection with customers in the taxing State is by common carrier or the United States Mail.' Under Bellas Hess, such vendors are free from state imposed duties to collect sales and use taxes.

Nexus Questions

1. Considering the business activities of CLIENT, do you concur with the conclusion in a.) above that CLIENT is not required to collect sales or use tax in **ILLINOIS** (nexus not established)?
2. Is it possible for an entity without nexus for sales and use tax to establish nexus in one of the other state taxes? If so, which tax is involved? If so, which activities establish nexus?
3. If an entity is not required to collect sales or use tax, can that entity volunteer to collect sales or use tax without exposing it to the associated liability for not collecting the correct amount of tax?
4. Assuming the business activities of CLIENT changes, would the solicitation or acceptance of sales within the state by a traveling salesperson establish nexus? If so, is the determination affected by the number of visits or time that a salesperson spends in the state? If so, what is the cutoff for determining nexus?
5. Assuming the business activities of CLIENT changes, would the mailing of marketing materials to customers within the state establish nexus? If so, is the determination affected by the quantity of marketing materials shipped or the number of times materials are shipped into the state? If so, what is the cutoff for determining nexus? If so, does it make a difference that marketing materials are

only shipped to existing customers and not in connection with a mass mailing solicitation?

6. Assuming the business activities of CLIENT changes, would the rental of T.P.P. within the state under an operating lease establish nexus? If so, is the determination affected by the term of the lease? If so, what is the cutoff for determining nexus?
7. Assuming the business activities of CLIENT changes, would the rental of T.P.P. within the state under a capital lease (purchase lease) establish nexus? If so, is the determination affected by the term of the lease? If so, what is the cutoff for determining nexus?

Any other guidance you can provide on determining nexus in **ILLINOIS** would be appreciated. If you have any questions, please contact me at the email address or physical address listed below.

DEPARTMENT'S RESPONSE:

Determinations regarding the subject of nexus are normally very fact specific. The Department has found that the best manner to determine nexus is for a Department auditor to examine all relevant facts and information. The following guidelines, however, may be useful to you in determining whether your client would be considered "a retailer maintaining a place of business in Illinois" subject to Use Tax collection obligations.

Whether a retailer is subject to Illinois Retailers' Occupation Tax (sales tax) liability or is required to collect Illinois Use Tax from its Illinois customers depends upon whether that retailer has sufficient "nexus" with the State of Illinois so that the retailer will be subject to Illinois law. The following information outlines the principles of nexus.

An "Illinois Retailer" is one who either accepts purchase orders in the State of Illinois or maintains an inventory in Illinois and fills Illinois orders from that inventory. The Illinois Retailer is then liable for Retailers' Occupation Tax on gross receipts from sales and must collect the corresponding Use Tax incurred by the purchasers.

Another type of retailer is the retailer maintaining a place of business in Illinois. The definition of a "retailer maintaining a place of business in Illinois" is described in 86 Ill. Adm. Code 150.201(i). This type of retailer is required to register with the State as an Illinois Use Tax collector. See 86 Ill. Adm. Code 150.801. The retailer must collect and remit Use Tax to the State on behalf of the retailer's Illinois customers even though the retailer does not incur any Retailers' Occupation Tax liability.

The United States Supreme Court in *Quill Corp. v. North Dakota*, 112 S.Ct. 1904 (1992), set forth the current guidelines for determining what nexus requirements must be met before a person is properly subject to a state's tax law. The Supreme Court has set out a 2-prong test for nexus. The first prong is whether the Due Process Clause is satisfied. Due process will be satisfied if the person or entity purposely avails itself or himself of the benefits of an economic market in a forum state. *Quill* at 1910.

The second prong of the Supreme Court's nexus test requires that, if due process requirements have been satisfied, the person or entity must have physical presence in the forum

state to satisfy the Commerce Clause. A physical presence is not limited to an office or other physical building. Under Illinois law, it also includes the presence of any agent or representative of the seller. This could include independent contractors. The representative need not be a sales representative. Any type of physical presence in the State of Illinois, including the vendor's delivery and installation of his product on a repetitive basis, will trigger Use Tax collection responsibilities. Please refer to *Brown's Furniture, Inc. v. Zehnder*, 171 Ill.2d 410 (1996).

The final type of retailer is the out-of-State retailer that does not have sufficient nexus with Illinois to be required to submit to Illinois tax laws. A retailer in this situation does not incur Retailers' Occupation Tax on sales into Illinois and is not required to collect Use Tax on behalf of its Illinois customers. However, the retailer's Illinois customers will still incur Use Tax on the purchase of the out-of-State goods and have a duty to self-assess their Use Tax liability and the customer must remit the amount directly to the State. The Use Tax rate is 6.25%.

I hope this information is helpful. If you require additional information, please visit our website at www.tax.illinois.gov or contact the Department's Taxpayer Information Division at (217) 782-3336. If you are not under audit and you wish to obtain a binding PLR regarding your factual situation, please submit a request conforming to the requirements of 2 Ill. Adm. Code 1200.110 (b).

Very truly yours,

Debra M. Boggess
Associate Counsel

DMB:msk